



July 6, 2016

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **WC Docket No. 16-106, Protecting the Privacy of Customers of
Broadband and Other Telecommunications Services**

Dear Chairman Wheeler:

The Multicultural Media, Telecom and Internet Council (“MMTC”), in partnership with eight national civil rights and social justice organizations (“Concerned Organizations”), urge the Federal Communications Commission (“FCC”) to consider the consequences of implementing the privacy framework proposed in its Broadband Privacy rulemaking proceeding,¹ because it would inevitably lead to consumer confusion and complexity in enforcement.

Our Concerned Organizations concur with the comments from the staff of the Federal Trade Commission’s (“FTC”) Bureau of Consumer Protection, which embrace a common sense approach to privacy built on multi-stakeholder input that has led to technology-neutral and consumer-friendly practices.² As we discussed in our initial comments, our Concerned Organizations also disagree with the presumption that Internet Service Providers (“ISPs”) must or should be regulated differently from online “edge” companies, which would contribute to increased consumer confusion.³ Instead, we urge the Commission to pattern its privacy rules for ISPs on the existing regulatory approach already developed by the FTC, which has been working and has led to industry practices that consumers are coming to understand.⁴ An abrupt and

¹ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (2016) (“NPRM”).

² Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission, WC Docket No. 16-106 (filed May 27, 2016) (“FTC Staff Comments”), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-federal-trade-commission-federal-communications-commission/160527fcccomment.pdf.

³ Comments of the Multicultural Minority Media, Telecom and Internet Council and Eight Leading Intergovernmental, Consumer, Business and Social Justice Organizations, WC Docket No. 16-106 (filed May 27, 2016) (“MMTC, et al. Comments”), <http://www.mmtconline.org/wp-content/uploads/2016/05/PARTNER-PRIVACY-COMMENTS-52716.pdf>.

⁴ *Id.* at 2.



complex divergence from this path is not warranted simply because the FCC, rather than the FTC, now has statutory jurisdiction over ISPs as common carriers.

Research from the Pew Research Center has found that most adults are not sure what information is being collected about them and how it is being used in the online space.⁵ Such response indicates that more education and exposure is needed to facilitate consumers' understanding when trying to make decisions about sharing their personal information with companies.

However, the concept of "companies" is broad to consumers, and unlike the FCC's proposal, consumers do not differentiate ISPs from "edge" companies in their online experiences and expect consistent privacy rules to apply to all participants in the Internet ecosystem. While we agree with the Commission's statements that consumers deserve "choice, transparency, and security"⁶ in the management of their personal data, our Concerned Organizations find that the Commission's current approach does not adequately address these concerns. Further, time has already been spent establishing "rules of the road" that match with consumers' expectations and use of the Internet through the multi-stakeholder, interagency approach.⁷ As highlighted in our previous comments, the FCC's departure from this framework would engender inconsistencies in the application of privacy protections across the various industries, platforms, and devices.⁸

As the NAACP pointed out in a March letter to the Commission, "ISPs are important, but are not the only important actors in this ecosystem that have access to, or knowledge of, customers' online activities."⁹ As our organizations have similarly suggested, "edge" companies that offer products and services online – consisting of consumers' social media networks, search engines, browsers, online retailers, and email services – are constantly accessing and tracking consumers' information to drive targeted advertising and profiling. Given the totality of the online experience across platforms and even devices, we strongly encourage the FCC to continue down the path that the FTC has set to establish consistent, harmonized consumer privacy protections for all participants online.¹⁰

By contrast, a fragmented approach to consumer privacy, which is currently under consideration, will have a deleterious effect on vulnerable consumers, who may be especially susceptible to harmful practices that hide behind the complexities of Internet data flow.¹¹

⁵ Lee Rainie & Maeve Duggan, *Privacy and Information Sharing*, PEW RESEARCH CENTER (Jan. 14, 2016), http://www.pewinternet.org/files/2016/01/PI_2016.01.14_Privacy-and-Info-Sharing_FINAL.pdf.

⁶ NPRM, 31 FCC Rcd at 2633.

⁷ *See, e.g.*, FTC Staff Comments at 5-6, 18-19; *see also id.* at n. 81.

⁸ *See* MMTC, et al. Comments at 5-7.

⁹ Letter from Hilary O. Shelton, Director, NAACP Washington Bureau, to Tom Wheeler, Chairman, Federal Communications Commission (filed Mar. 23, 2016), <https://morningconsult.com/wp-content/uploads/2016/03/-NAACP-FCC-Letter.pdf>.

¹⁰ FTC Staff Comments at 3-4 (describing the underpinning of the FTC's regime, which prohibits unfair and deceptive practices, and outlining various FTC enforcement efforts).

¹¹ MMTC, et al. Comments at 7-8.

The Commission’s proposed privacy framework will also not directly address nor resolve online predatory practices and apps discrimination¹² that negatively affect vulnerable populations, including people of color, seniors, the economically disadvantaged, the disabled, and LGBT consumers. Thus, in our view, any new privacy framework should concretely address the issues of data profiling and apps discrimination that were amplified in the 2014 *Civil Rights Principles for the Era of Big Data* drafted by the ACLU and Leadership Conference on Civil and Human Rights.¹³

Our Concerned Organizations encourage a more coherent approach to online privacy that makes sense for consumers— ideally based on the familiar and effective approach of the FTC.¹⁴ The FTC enforces a prohibition on “unfair” and “deceptive” acts or practices affecting commerce, as well as a range of other privacy-related statutes and rules.¹⁵ With more than 500 cases adjudicated under agency rules and regulations, the FTC over a number of years has built up the expertise, experience, and judgment to understand how consumers interpret, manage, and are affected by online influences.¹⁶ Our Concerned Organizations respect the policy choices reflected in the FTC’s privacy precedent and encourage the FCC to embrace a comparable pathway to a more sensible and inclusive privacy regime.

Our Concerned Organizations also strongly support the FTC’s position that the FCC must not impose specific requirements on ISPs that do not align with the obligations of “edge” companies that collect the same, and even more, consumer data.¹⁷ We concur with the FTC that doing otherwise would generate a less than optimal outcome for consumers, who would be burdened with the difficult – and, for many consumers, impossible – task of determining the origin and source of the online harm. While our Concerned Organizations also agree with the FTC staff that there should be some harmonization of privacy policy templates and translation into multiple

¹² Lauren Kirchner, *When Discrimination is Baked is Baked into Algorithms*, THE ATLANTIC (Sept. 6, 2015), <http://www.theatlantic.com/business/archive/2015/09/discrimination-algorithms-disparate-impact/403969>.; see also Jessica Guynn, *‘Three black teenagers’ Google Search Sparks Outrage*, USA TODAY (June 10, 2016), <http://www.usatoday.com/story/tech/news/2016/06/09/google-image-search-three-black-teenagers-three-white-teenagers/85648838>.

¹³ Comments of American Civil Liberties Union and the Leadership Conference on Civil and Human Rights, Nat’l Telecommunications & Info. Admin., Docket No. 140514424–4424–01 (filed Aug. 5, 2014) (Comments in NTIA’s “Big Data and Consumer Privacy in the Internet Economy” proceeding), https://www.aclu.org/sites/default/files/field_document/2014-8-5_joint_ntia_big_data_comments_aclu_leadership_conference.pdf. In this proposal, the ACLU and Leadership Conference proscribe that online privacy policies “stop high tech profiling; ensure fairness in automated decisions; preserve constitutional principles; enhance individual control of personal information; and, protect people from inaccurate data representation.”

¹⁴ FTC Staff Comments at 35-36 (providing a concise summary of the FTC’s seven primary points).

¹⁵ *Id.* at 4.

¹⁶ Lesley Fair, *FTC staff comments on FCC privacy proposal*, FTC Business Blog (June 1, 2016, 11:00AM), <https://www.ftc.gov/news-events/blogs/business-blog/2016/06/ftc-staff-comments-fcc-privacy-proposal>.

¹⁷ FTC Staff Comments at 8.



languages, we also encourage a multi-stakeholder, inter-agency process to determine the most viable ways to reach affected consumers.

We further caution the FCC from favoring the concept of mandatory “opt-in” consent requirements for ISPs whenever they seek to compete against third parties in offering non-communications products and services. Such rules would impose additional consumer burdens in an already complicated privacy regime.¹⁸ In her statement on the proceeding, FTC Commissioner Maureen Ohlhausen asserted that “reading a notice and making a decision takes time that, in the aggregate, can be quite substantial [for consumers]. Regulations should impose costs in a way that maximizes the benefits while minimizing the costs.”¹⁹ In the case of the FCC’s proposed “opt-in” regime for ISPs, consumers will be forced to assess every decision, product, and purchase, which lends itself to potential misunderstandings, impatience, and confusion – much like what Pew described in their research.

This type of broad opt-in consent would hamper the ability of ISPs ability to compete against “edge” companies, which do not face the same obligations. Thus, our Concerned Organizations agree with the FTC that the FCC’s “opt-in” consent proposals should focus most attention on sensitive personal information, such as financial or health data, which consumers tend to care more about.²⁰

We also find that informed consent requirements around potentially sensitive information can provide additional safeguards for ISPs and other companies to offer free or discounted services to consumers, particularly those where the cost of these goods matter. As we pointed out in our previous filing, cost and digital literacy “[are still the] driving factor[s] in whether consumers adopt broadband at all, as well as the type of broadband service consumers select to use.”²¹ Given this, we believe that the FCC should not restrict innovative products and services that

¹⁸ Christin S. McMeley et al., *The FCC’s Privacy NPRM: A Closer Look at the Commission’s Legal Authority and Some of Its Proposals*, Davis Wright Tremaine LLP Legal Blog (Apr. 26, 2016), <http://www.dwt.com/The-FCCs-Privacy-NPRM-A-Closer-Look-at-the-Commissions-Legal-Authority-and-Some-of-Its-Proposals-04-26-2016/>.

¹⁹ Maureen K. Ohlhausen, Commissioner, FTC, *Statement Regarding Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, FCC Notice of Proposed Rulemaking*, WC Docket No. 16-106 (May 27, 2016), https://www.ftc.gov/system/files/documents/public_statements/951923/160527fccohlhausenstmt1.pdf.

²⁰ Collaborative processes fostered by various federal agencies, including the FTC, have already yielded a workable understanding for what constitutes – in the FCC’s terminology – personally identifiable information (“PII”) and we encourage the FCC to follow this course. For example, the FTC has been historically supportive of the use of “opt-in” for the “...collection, use, and sharing information of sensitive data (e.g., Social Security numbers and children’s, financial, health, and geolocation data) because “the more sensitive the data, the more consumers expect it to be protected and less they expect it to be used and shared.” FTC Staff Comments at 21. Our Concerned Organizations agree with this recommendation that ISPs obtain opt-in consent when the data encroaches upon sensitive data, “regardless of whether such data were to be used for first-party marketing or shared with third parties.” *Id.* at 22.

²¹ MMTC, et al. Comments at 7 (citation omitted). In our previous comments, we also proposed that the FCC educate consumers about the relative strengths and weaknesses of different broadband technologies (e.g., capacity constraints and mobility) to accelerate broadband adoption.



offer flexible pricing options for cost-sensitive consumers, as long as those offers explain in plain English what kind of personal disclosures would be required, that the requested personal information is reasonably relevant to the service or product being offered, and that the alternative options (*i.e.*, the same offering at a higher price but without personal disclosures) also are described.²²

In our view, these types of programs have genuine consumer benefits and can be managed and implemented in transparent and appropriate ways. As a result, we reject the FCC’s suggestion they are somehow coercive or unfair. As stated in our prior comments, financial inducements offered by the ISPs, e.g., loyalty programs, and the ease of billing arrangements, can serve to significantly drive online usage, and even help financially challenged consumers by offering bundled services and extended payments on other related goods and services, such as mobile chargers and cases.²³

We are in firm agreement that online privacy and security are critical to ensuring consumers a safe and efficient broadband experience. Yet, the FCC proposal is mired with complexity that could result in the application of bright line rules from an outdated regulatory framework to a more robust and sensitive ecosystem. These rules also appear to deviate from consumers’ common sense understanding for how to safeguard their online privacy. Under this proposed framework, consumers become the “victims” instead of the “beneficiaries” of sound privacy policies and practices.

For the FCC’s new broadband privacy regime, our Concerned Organizations recommend that the agency adopt more flexible, consumer-centered rules to address issues on a case-by-case basis, and develop policy based on specific cases and facts, which is in line with the FTC’s recommendations and those of other commenters.²⁴ In conclusion, the FCC’s currently proposed privacy framework is overly complex and fails to comprehend consumers’ expectations of the Internet and their common sense understanding for how it works.

Sincerely,

²² *Id.* a 7, 9; *see also* Comments of AT&T Services Inc., WC Docket No. 16-106, at 2 (filed May 27, 2016), <https://ecfsapi.fcc.gov/file/60002080023.pdf>; Comments of Association of National Advertisers, WC Docket No. 16-106, at 5-11 (filed May 27, 2016), <https://ecfsapi.fcc.gov/file/60002079550.pdf>.

²³ MMTC, et al. Comments at 8.

²⁴ FTC Staff Comments at 4 (describing the FTC’s “wide range of cases” brought, and how “[e]nforcement is the lynchpin of the FTC’s approach to privacy protection”).



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LGBT Technology Partnership
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